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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 579

SOUTHERN PACIFIC COMPANY (a corporation),
Petitioner,

vs.

GARRY T. GUTHRIE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent contends that the Petition for a Writ of Certiorari should be denied.

The only question to be here considered is whether an appropriate ground exists for the issuance of a Writ of Certiorari. Petitioner has failed to show that the Court below rendered a decision in conflict with the decisions of other Circuits of the United States Courts of Appeals, although it claims that dictum in the opinion on rehearing of the Court below demonstates such variance. Any alleged conflict between the Circuits has been resolved by the decision of this Court in *Affolder v. N. Y., Chicago & St. L. RR.*, 339 U.S. 96, and furthermore, the decision of the Court below was not based on whether it had power to reduce a money judgment but was based on the fact that it refused to disturb the judgment in the instant case because it was neither "monstrous" nor "grossly excessive". Neither does Petitioner show that the Court below so far departed from the accepted and usual norm of judicial proceedings as to call for an exercise of this Court's power of supervision, nor does it show that an unique question is involved.

This Court, on the question of granting or refusing certiorari, is not interested in dictum, but only on the importance of the issue actually decided. This Petition for Certiorari is merely an attempt to have this Honorable Court review the two decisions of the Court below affirming a judgment on a verdict for damages for personal injuries and to review the order of the trial judge denying a new trial on the single issue of the alleged excessiveness of the verdict.

STATEMENT OF THE CASE.

The action herein, based on negligence of Petitioner, was brought under the provisions of the Federal Employers' Liability Act (45 U.S.C.A. 51) in the United States District Court for the Northern District of California, Southern Division, and tried before a jury, which returned a verdict for Respondent for $100,000.00.

Respondent, an engineer, was run over by a locomotive of Petitioner, through its negligence, on October 27, 1947, and lost his right leg above the knee. At the time of his injuries, Respondent was 58 years and ten months old (R. 164). A contracture of twenty-seven degrees developed in the remainder of his right leg so that the stump of his leg extended at an angle which prevented him from wearing an artificial leg, and it appeared probable that he would never be able to wear one (R. 230-231).

The Court of Appeals for the Ninth Circuit, in its opinion on rehearing (R. 380), computed the present value of loss of future earnings as being between a maximum of $63,778.33 and a minimum of $55,515.74 (R. 384).[1]

We deem it unnecessary to further burden this Court with the facts, as they are accurately stated in the decisions of the Court of Appeals, on both the appeal and the rehearing. (R. 352 and 380).

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[1]The United States Court of Appeals for the Ninth Circuit, in its opinion on rehearing, said: "Under the circumstances, we cannot assume that the trial judge was wrong in stating that the figure exceeded $60,000.00". (R. 384.)

THE DECISIONS BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ON ORIGINAL APPEAL AND REHEARING.

In the original decision on appeal, the Court of Appeals for the Ninth Circuit in its opinion in 180 F. (2d) 295 (R. 352), found that there was nothing in the case sufficient to establish the existence of passion or prejudice (R. 377), and further found that it was unnecessary to express any opinion as to whether the Court may or may not, under the circumstances, review the action of the trial court in denying a motion for a new trial on the ground of alleged excessiveness of the verdict (R. 377). The Court below further stated in said opinion that it could not say that the verdict is so large that the refusal of the trial judge to grant a new trial, or to condition a denial of a new trial on a remittitur, could be called an abuse of discretion. The majority of the Court thought the amount of the verdict left it within the area of the trial Court's discretion (R. 377).

Petitioner, in its petition for a rehearing, raised the issue as to the power of the Court below to review the decision of the trial Court in denying a motion for a new trial made on the ground of excessive damages. The Court below granted a rehearing limited to the question "whether the damages are excessive, and, if so, what the action of the Court should be?"

The Court below, on the rehearing, again affirmed the judgment and held that the trial judge, in his order denying a new trial, committed neither error of law nor abuse of discretion (R. 395-396). The Court

below, in its decision on rehearing, further stated that the amount of damages could not be characterized as "monstrous" or "grossly excessive" and quoted therein the decision of this Court in *Affolder v. N.Y., Chicago & St. L. RR. Co.*, supra, (R. 398).

ARGUMENT.

Petitioner is correct in its statement that this Court does not sit to write academic essays but to decide concrete cases. Yet, by its petition, it is asking this Honorable Court to do just that when it poses the question, have federal appellate courts the power to reverse a judgment and order a new trial absolutely or conditionally, where the jury has awarded an amount which is grossly excessive or monstrous? (P. 13). Such a question is purely academic, because the decisions of the Court below, both on direct appeal and on rehearing, and the order of the trial judge denying a new trial (R. 71) all have expressly found that the amount of the verdict in this case is neither monstrous nor grossly excessive, and the Court below has twice affirmed the judgment. Petitioner, furthermore, has requested this Court to review an alleged conflict between the United States Courts of Appeals in various circuits concerning Appellate Court power to reverse or grant a new trial, absolutely or conditionally. Any such alleged conflict is not involved here, as the Court of Appeals, in both its decision on appeal and on rehearing, has stated that it believes it has the power to reduce a

damage judgment after a denial of a motion for a new trial on that ground, when it is grossly excessive or monstrous, but it specifically found in this particular case that the judgment was not in those categories (R. 398). In fact, said Court, in its opinion on the rehearing herein, relied on the opinion of this Court in the case of *Affolder v. N.Y., Chicago & St. L. RR. Co.*, supra, and held that, unless there was an error of law or an abuse of legal discretion by the trial court, which, incidentally, is not found here, it would not disturb the judgment on the verdict unless it was monstrous or grossly excessive. The majority decision stated "that the verdict in this case cannot be so characterized" (R. 398).

The *Affolder* case, indeed, is now controlling in all the circuits and there is, therefore, no such conflict between the circuits as alleged by Petitioner. As stated above, the alleged conflict, even if it had not been determined by this Court in the *Affolder* case, would have no bearing on the case at bar, because the Court below indicated that it had the power to reduce the judgment if it had found it monstrous or grossly excessive (R. 392).

Incidentally, the Court below in the instant case followed the reasoning of this Court in the *Affolder* case, as likewise did the Appellate Court in *St. Louis Southwestern Ry. Co. v. Ferguson,* (8 Cir.) 182 F. (2d) 949, cited by Petitioner, inasmuch as both Courts realized they had the right to reduce a damage judgment which was monstrous or grossly excessive. How-

ever, each Court found that the judgments in the particular cases before them were not monstrous or grossly excessive and on that ground only, refused to reduce the judgments.

The gist of Respondent's position in opposition to this Petition for a Writ of Certiorari is that the Supreme Court and the Courts of Appeals, on the question of claimed excessiveness of a verdict for damages, should neither reverse, nor grant a new trial, either absolutely or conditionally, if the trial judge has denied a new trial, unless the record clearly discloses prejudicial errors of law, abuse of legal discretion, passion or prejudice, or that the verdict was monstrous or grossly excessive.

Affolder v. N.Y., Chicago & St. L. RR. Co., supra;

Southern Ry. Co. v. Bennett, 233 U.S. 80 at 87;

Fairmount Glass Works v. Coal Co., 287 U.S. 474 at 482.

The Court below, on rehearing, found it unnecessary in arriving at a decision to determine whether or not it had power to reduce a damage judgment (R. 387). As dictum, it stated that it did have such power where the record indicated an abuse of legal discretion by the trial judge, in denying a motion for a new trial, or where the record indicated that the amount of the judgment was monstrous or grossly excessive. The Court specifically found herein that the judgment was neither grossly excessive nor monstrous (R. 398), and that the record did not indicate any error of law

by the trial judge, and, therefore, affirmed the judgment.

The question posed by Petitioner as to the powers of the Court below is, therefore, moot.

CONCLUSION.

The decision of the Court of Appeals herein, on rehearing, is correctly based upon the opinion of this Court in the *Affolder* case.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
March 21, 1951.

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